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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 84.

CHARLES McINTIRE, APPELLANT AND PLAINTIFF IN ERROR,

vs.

EDWIN A. McINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE.

No. 85.

EDWIN A. McMcINTIRE, ADMINISTRATOR C. T. A. OF DAVID McINTIRE ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

CHARLES McINTIRE.

BRIEF FOR CHARLES McINTIRE.

WM. G. JOHNSON,
Counsel for Charles McIntire.

THE LAW REPORTER COMPANY, PRINTERS, WASHINGTON, D. C.

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Statement of the Case.

These causes are brought to this court by cross appeals from and writs of error to the Court of Appeals of the District of Columbia (Rec. pp. 62–63) to review the judgment of that court (Rec. p. 62) affirming the judgment of the Supreme Court of the District of Columbia (Rec. pp. 53–54) overruling exceptions taken by Charles McIntire (Rec. p. 52) and by Edwin A. McIntire, administrator c. t. a. of David

McIntire (Rec. pp. 52–53) to the second account of Edwin A. McIntire as such administrator c. t. a. (Rec. pp. 46–51).

A previous account had been filed by the administrator (Rec. pp. 34–36) to which exceptions were filed by Charles McIntire (Rec. pp. 36–38), all of which exceptions were overruled by the Supreme Court of the District of Columbia (Rec. p. 39). From this order an appeal was taken by Charles McIntire to the Court of Appeals (Rec. p. 40), and the judgment of the said Supreme Court overruling the said exceptions was reversed by the Court of Appeals (Rec. p. 44) and the cause remanded to the Supreme Court of the District of Columbia to restate the account of the administrator in accordance with the opinion of the Court of Appeals (Rec. pp. 68–76).

Upon said remanding of the cause to the Supreme Court of the District of Columbia the account now in controversy (Rec. pp. 47–51) was stated in accordance with the mandate and opinion of the Court of Appeals, to which Charles McIntire and the administrator c. t. a. both filed exceptions as before stated (Rec. pp. 52–53), which were overruled Rec. pp. 53–54), the account approved and passed, and the administrator c. t. a. directed to make distribution of the estate in accordance therewith (Rec. pp. 53–54). This last and final judgment was affirmed by the Court of Appeals upon the grounds stated in its opinion on the first appeal (Rec. pp. 61, 68–76).

The appellant and plaintiff in error, Charles McIntire, excepted to the account because (1) the distribution of the residuum was made among all the children of the two brothers of the testator *per capita* instead of between the two sets of children *per stirpes*, and also because (2) the children of Edwin T. McIntire were not charged with the sum of $11,000 paid to their counsel during litigation (Rec. p. 52).

The residuum, as shown by the account, amounts to $61,483.20 (Rec. p. 50), of which there is distributed to this appellant and plaintiff in error in the *per capita* distribution

one-sixth, or $10,247.20 (Rec. p. 50), instead of one-half under a *per stirpes* distribution as claimed in his exception (Rec. p. 52).

The facts out of which this controversy arises are few and simple.

David McIntire, the testator, a bachelor, died on the 1st of April, 1894, leaving a brother, Charles McIntire, sr., and five children of a predeceased brother, Edwin T. McIntire, as his next of kin, and leaving a large personal estate.

The will as probated is in two parts (Rec. pp. 6–7), and dated, respectively, January 7, 1880, and January 1, 1880. The question of construction arises upon the terms of the paper dated January 7, 1880 (Rec. p. 6), which is expressed in the following language:

> "This my last will and testament.
>
> "I David McIntire. tin-plate worker, of this city of do will, bequeath, or devise, to my nephews, and nieces, that is to say, from July the first. 1st eighteen hundred and fifty-four. 1854
>
> "To the opening of. or reading of this, paper. one thousand three hundred and fifty dollars and sixty-four cents ($1,350.64) is to be calculated at six 6 per cent. interest
>
> "That amount whatever it may be is to be given to each of my Brother Edwin's children. The remainder if any, is to be equally divided between my brothers Edwin and Charles children."

At the date of this paper the testator's brother, Charles, was living, and had two sons, Charles and Henry, the latter dying before the testator, on April 21, 1880 (Rec. p. 56).

The testator's brother Edwin was dead at the date of this paper, leaving six children, viz: Edwin A. McIntire, Martha McIntire, Emma T. McIntire, Elizabeth M. Test, Adaline McIntire, and Sarah McIntire. Sarah predeceased the testator on January 10, 1881 (Rec. p. 56).

At the date of the will and at the time of his death the

testator, David McIntire, was the owner and holder of five promissory notes of his brother Charles McIntire, all dated January 2, 1854, and amounting in the aggregate to the principal sum of $1,350.63 (Rec. p. 56).

The will was filed on the 8th of April, 1884, and admitted to probate on the 12th of the same month. The will names no executor and letters of administration with the will annexed were issued on said 12th of April to Edwin A. McIntire (Rec. p. 1) upon a bond of only $8,000 (Rec. pp. 8–9).

The law required an inventory to be filed within ninety days after the granting of letters, but none was filed until January 26, 1885 (Rec. p. 1), which alleged an estate of $47,987.20.

In February, 1885, litigation respecting the conduct of Edwin A. McIntire, administrator c. t. a., growing out of the fraudulent concealment by him of $10,000 belonging to the estate, was prosecuted, as shown by the transcript of the proceedings (Rec. pp. 1, 5, 9, 14), As a consequence of this litigation the administrator was required to deliver all the assets of the estate to custodians appointed by the court (Rec. pp. 10, 11, 15, 16, 17, 20), who cared for and administered the estate from the 19th of February, 1885, until the 7th of July, 1896, when they were directed to turn over the assets to the administrator c. t. a. upon his filing bond in the sum of $100,000 (Rec. p. 31).

On the 5th of June, 1885, Charles McIntire, sr., the brother of the decedent, filed a caveat to the will. Pending those proceedings Charles McIntire, sr., died, and the present appellant and plaintiff in error was substituted in his place on November 20, 1890 (Rec. p. 43). On January 15, 1891, a verdict was rendered sustaining the will (Rec. pp. 7, 8), and the judgment thereon was affirmed by this court in the case of McIntire *vs.* McIntire, 162 U. S., p. 383.

In the course of the litigation the custodians of the estate

paid to the counsel of Edwin A. McIntire and his sisters, upon their petition and by orders of the court, various sums aggregating $12,000 as counsel fees (Rec. pp. 15, 18, 19, 20–22, 23, 25, 26). It is claimed by the appellant and plaintiff in error, Charles McIntire, that these payments should be charged as a distribution to the legatees, upon whose petition and to whose counsel they were paid, and not out of the estate generally, thus diminishing the resdiuum and the action of the court, overruling this objection, was the subject of his exception to the account (Rec. p. 52).

It is thus seen that upon this appeal and writ of error but two questions are presented, namely (1) the proper construction of the residuary clause of the will, and (2) the propriety of allowing, out of the estate, counsel fees paid to the counsel of five of the principal legatees under the will.

Assignment of Errors.

1. The court erred in adjudging that under the residuary clause of the will the residue of the estate should be distributed among all the children of the testator's two brothers *per capita*.

2. The court erred in not adjudging that under the residuary clause of the will, the appellant and plaintiff in error, Charles McIntire, was entitled to one half of the net residue of the estate.

3. The court erred in adjudging that the counsel fees paid to the counsel of the legatees should not be charged against their distributive shares in the estate and in adjudging that the same be charged against the estate in diminution of the general residue.

4. The court erred in overruling the first exception of Charles McIntire to the account.

5. The court erred in overruling the second exception of Charles McIntire to the account.

ARGUMENT.

The First, Second, and Fifth Errors Assigned.

The question raised by these assignments of error is as to the correct interpretation of the residuary clause of the will, which is expressed in very few words, thus: "The remainder, if any, is to be equally divided between my brothers Edwin and Charles children."

By this language did the testator intend to mass together all the children of both brothers or did he intend to separate them into two classes, distinguished and identified by their respective fathers?

The intent of the testator is to be ascertained from an examination of the whole instrument and also in the light of the surrounding facts and circumstances existing at the time of its execution.

It is submitted that there is inherent evidence in these testamentary papers of the testator's capacity to designate the beneficiaries under his will individually and in classes when such was his purpose.

In the curious paper dated January 1, 1880 (Rec. pp. 6–7), after a somewhat solemn introduction, the testator bequeaths his clothing to those that they fit, but in respect of this trifling bequest he directs that a rough estimate is to be made and the articles divided, "*nephews first.*"

Here he makes no separation between the children of his two bothers except one of sex.

Later on he makes specific bequests of trifling objects to different nieces and nephews, thus showing a complete comprehension of the necessities of a gift to individuals.

In the important paper bearing date January 7, 1880, disposing of his valuable estate he uses the phrase in the first clause, "to my nephews and nieces," showing that he understands the collective phrase which comprehended all of his collateral next of kin, except his brother, irrespective of which brother's children they might be; and appreciating

that that clause was coextensive with all of his nieces and nephews, he limits it in the next clause by saying it "is to be given to each of my brother Edwin's children," thus not only distinguishing those nieces and nephews from the nephews, children of his brother Charles, but fixing their *per capita* right to the fund, to be computed, by the use of the word "*each*."

Having thus definitely fixed the interest of his nieces and nephews, the children of his brother Edwin, the testator then proceeds by perfectly plain terms to divide the residuum between the two sets of children. And here it is to be observed that it is not a joint bequest to the children of his brothers Edwin and Charles to be equally divided between or among them, but the severance is before the designation of the recipients.

The *remainder* is to be equally divided. The subject of the division is the *remainder*. The character of the division is *equality* and the distribution when so divided is *between* the brothers Edwin's and Charles' children. And it is submitted that the use of his two brothers' names in that connection, when the mere designation of "nephews and nieces" would have sufficed for an equal per capita division, serves as the caption to designate the two sets of children who are to be the recipients of this equally divided residuum.

The language and style of this instrument are sufficiently peculiar to merit its classification among testamentary oddities, while the pecuniary bequests to his nephews and nieces, his brother Edwin's children, is not only stated in unusual language, but has a most peculiar basis fixed for the ascertainment of its amount. A fixed sum, $1,350.64, is to be calculated at 6 per cent interest from the 1st of July, 1854, down "to the opening of or reading this paper," i. e., the death of the testator.

Without the aid of any surrounding facts or circumstances this bequest is most extraordinary. With the aid, however, of the surrounding facts and circumstances it

becomes clear and rational, and not only the purpose of the testator, but the reason of his purpose, becomes plainly apparent.

The testator's brother Charles had owed him a sum of $1,350.63, within one penny of the principal amount of said legacy, since 1854, for which the testator held the five promissory notes of his brother Charles, dated January 2, 1854. The testator's brother Edwin was dead, and the testator appears to have sought to equalize the family of his two brothers by giving to the children of his brother Edwin the amount of his brother Charles' indebtedness with interest from the year of its creation down to the date of the testator's death. Having in this mode given to the children of his deceased brother Edwin a sum equal to the advancement to his brother Charles with interest, he then provides for the equal division of the residuum of his estate, and that residuum of his estate when and after being thus equally divided is to go to the two sets of children, those of his brother Edwin and those of his brother Charles.

It is respectfully submitted that no other rational explanation can be furnished of the curious language and the cumbersome disposition of his estate than that it was the intention of the testator by his special pecuniary bequest to the children of Edwin to place that set of children upon what he conceived to be an equality with his brother Charles, and having thus equalized the situation to divide the remainder of his estate into two parts between the children of his two brothers.

This was the view taken by the Supreme Court of Georgia in a case of somewhat similiar circumstances.

In White *vs.* Holland, 92 Ga. 216, the testatrix had two sisters and a brother, all of whom were living when the will was made, and all of whom had children.

The will directed the residuum to be equally divided between the sisters and the children of the brother.

The court, by Lumpkin, J., held that the children of the

brother, as a class, took *per stirpes* one-third and each of the sisters one-third, and reached this result not only from the context, but by reference to the proved fact that the brother was financially embarrassed and that certain conduct in his past life had led the testatrix to disregard him in the will and give what would otherwise have been his share to his children.

The Residuary Clause Directs an Equal Division Between Two Classes of Children.

Even if the facts and circumstances surrounding the testator be disregarded and the words of the will alone be considered it is submitted that in the construction put upon the residuary clause the learned Court of Appeals erred.

The word "*between*" without something to qualify its ordinary meaning must be taken in its proper sense as indicating a division *between two* and not *among* six.

In Ihrie's Estate, 162 Pa. St. 369, the residuary clause was—

> "The residue of my estate is to be divided *between* my husband's grandchildren and the children of Ferdinand Poree."

The court below decided that the two sets of children took *per stirpes*.

The Supreme Court, affirming this ruling, said (p. 372):

> "Did she mean that the fifteen grandchildren should take one-half and the four Porees the other half, or did she mean a division per capita, one-nineteenth to each?
>
> "*The word 'between' refers properly to two, and not more.* It is true that it is not unfrequently used, especially by the uneducated, and colloquially, in the sense of 'among,' as referring to more than two objects. But that admittedly is not its correct use. *The presumption is in favor of the proper and correct use of words, whether technical or belonging to the language of ordinary life.* . . .

> "But if we concede that the testatrix was illiterate, it would not follow that she used the word incorrectly. The great mass of the words even of illiterate persons are used correctly. The lapses are only occasional, or the language would cease to serve the purposes of communication. *Illiteracy therefore raises no presumption that words are used incorrectly.*"

In Green's Estate, 140 Pa. 253, the testator bequeathed half his property to his wife,

> "The other half to be divided equally between Josephine Lukens and the children of John R. Ash in the event of the death of Josephine Lukens, her portion to go to the children of John R. Ash."

The court held Josephine Lukens took one half and the children of John R. Ash the other half, and that the word "between" must be assumed to have been used in its ordinary signification.

The auditor, whose report is adopted by the court as its opinion, said (p. 255):

> "Applying this well understood distinction to the direction of the will that the half should be 'divided equally between Josephine Lukens and the children of John R. Ash,' it is obvious that, in drawing the line, he put on one side of it Miss Lukens and on the other he arranged the Ash children as a class. If he had intended each of them to have an equal share with her, he would have used other language, probably directing a division 'amongst Josephine Lukens and the children of John R. Ash, each to take an equal share.' To adopt the language used in Risk's App., 52 Pa. 269, 'had he meant the children to take *per capita*, he doubtless would have named them.'"

Had the testator in this case intended the residue to go to all his nephews and nieces in equal shares, *per capita*, it would have been very simple and natural to have bequeathed the residue to his nieces and nephews or to the children of his

brothers without specifying how it was to be divided. They would then have taken *per capita.*

As said by Chief Justice Marshall in Walker *vs.* Griffin, 11 Wh. 375, 379 :

> "Had he intended them to take equally, the most natural mode of expressing that intention would have been to devise the property to the children of Cyrus and John T. Griffin."

In Records *vs* Fields, 155 Mo. 314, the Chief Justice, delivering the opinion, says (p. 321):

> "The words of the third paragraph of the will are: 'The balance of my property and money I want equally divided between the heirs of William Fields and James Fields, deceased.' Now it is evident that their were no joint heirs of William and James. There were heirs of James, deceased, and there were heirs of William, deceased. The meaning, then, of the clause on this point is that the property is to be equally divided between the heirs of James Fields and the heirs of William Fields. Whether we construe the word 'heirs' in this clause as a technical word or as synonymous with children and grandchildren it will not solve the difficulties suggested by the astute counsel. Back of this lies the crucial test, Did or did not the testator intend to make two classes of these heirs or children?
>
> "What is, first, the ordinary and usual meaning of the words 'between the heirs of James and the heirs of William?' Unquestionably it conveys the thought of two parts, a distribution with reference to two parts, one part to heirs of James, the other part to heirs of William. Not only is this the natural and ordinary meaning of the words 'equally divided between the heirs of William Fields and the heirs of James Fields,' but this is also the true etymological significance of the word 'between.'
>
> . . . . . .
>
> (p. 322): "Using the word then in its proper and correct sense the phrase 'equally divided be-

> tween the heirs of William Fields and James Fields, deceased,' should be construed as 'equally divided into two parts, one to the heirs of James Fields and one to the heirs of William Fields.'"

Basis of the Construction by the Court of Appeals.

In reaching its conclusion as to the correct interpretation of this will the Court of Appeals does not consider the language of the whole will, nor any of the surrounding facts and circumstances shedding light upon the motives and purposes of the testator or the objects he had in view, or the peculiar situation which his brother, Charles McIntire, bore to this singular testamentary disposition, but it simply isolated the words of the residuary clause entirely apart from context and surrounding circumstances, and applied to them a technical rule of construction, which, it is submitted, has, under modern decisions, lost most, if not all, of its force.

In its opinion upon the question of the proper construction of the residuary clause of the will, the Court of Appeals says (Rec. pp. 75–6):

> "The provision that the residue of the estate 'be equally divided between my brothers Edwin and Charles' children' can only be satisfied by a division *per capita*. The children of Edwin and Charles are not divided into classes, but made one. Maddox *vs.* State, 4 H. & J. 539; Britton *vs.* Carson, 46 Md. 186. In the first of those cases the bequest was 'to be equally divided between my brother Justinian and my brother George's children.' In the second it read: 'shall be equally divided between my said daughter and the children of Virginia Carson.' In both the distribution was ordered to be made *per capita*. See, also, Benson *vs.* Wright, 4 Md. Ch. 278; Allender *vs.* Kepler, 62 Md. 7."

It is to be observed that the Court of Appeals confines itself, in its citation of authority, to the four decisions in Maryland, the earliest of which was decided in 1819, and

therefore of no controlling force in this jurisdiction. It is submitted, however, that the decisions in Maryland have not been entirely uniform and harmonious, and it may well be doubted, if, in view of recent decisions, the technical rule originating in Webb *vs.* Blakeler, *infra*, is in force in that State.

It is also respectfully submitted that an examination of the cases cited by the Court of Appeals will show that they are not entitled to very much weight in determining the question in hand.

Thus the case of Maddox *vs.* the State, 4 H. and J. 539 (1819), was an action on the bond of an executor.

The will bequeathed the residue "to be equally divided between my brother Justinian and my brother George's children."

The trial court instructed the jury (p. 540) that Justinian "took as tenant in common an equal part and no more with each of the children of George," to which the defendant excepted.

The opinion of the court, by Chase, Ch. J., in its entirety, is as follows (p. 541):

> "It has been established that in order to take advantage of the act of limitations it must be pleaded. The court concur with the court below in the opinions expressed in the several bills of exceptions."

On reference to the argument of counsel it appears (p. 541) that but two objections were urged to the judgment of the court below, viz: That the bond was barred by limitations and that there was a misjoinder of parties.

Thus it is seen that the question upon which the case is cited as authority was not urged by counsel and is not discussed or even mentioned by the court in its opinion.

In Brittain *vs.* Carson, 46 Md. 186, the residuary clause was as follows:

> "It is my will that the rest, residue, and remainder

> of my said estate, together with all my right and interest in and to the estate and property of my deceased wife Hannah Randolph, shall be equally divided between my said daughter, Amelia J. Brittain, and the children of Virginia Carson."

The court, by Brent, Justice, after stating that there was no other light to be thrown upon the will than was contained in these words says (p. 188):

> "A long series of uniform decisions has given a settled construction to provisions in a will similar to this, all holding that the legatees by force of the language used take equally and that the distribution is *per capita.*'

This decision, as will be seen from the report, rests solely upon the technical rule originating in the case of Webb *vs.* Blakeler, 2 P. Wms. 383, which, it is submitted, is no longer considered authority by the courts.

In the case of Benson *vs.* Wright, 4 Md. Ch. Dec. 278 (1848), the property was devised to trustees, in trust—

> "for the use of the children of Margaret Swornstedt, the daughter of my late husband Peter Benson; the children of William Benson, the son of my late said husband, and George Benson, also a son of my late said husband, equally, *as tenants in common*, their heirs and representatives forever."

A bill was filed to obtain the instructions of the court as to the distribution of the income of the trust estate.

The court held that the children and Benson took *per capita.* The question is not discussed by the chancellor, nor does it appear from the report to have been argued by counsel or contested in the pleadings, while the express terms of the devise declared all the parties to be equal tenants in common with each other.

In Allender *vs.* Keplinger, 62 Md. 7, the last case cited in the opinion of the Court of Appeals, the testator bequeathed the property to his daughters for life and after their death directed that it—

> "shall be equally divided among the lawful issue of my son John Etchberger lately deceased and the lawful issue of my two daughters Mary and Elizabeth aforesaid, *or the survivors of their issue*, but in case the property hereby bequeathed can not be equally divided then and in that case I hereby direct my executors hereinafter named to sell the same and *distribute* the proceeds thereof *share and share alike among* the lawful issue of my above named son and daughters *or the survivors of them the said issue.*"

Here it is to be observed that there was no direction to divide the property equally *between* the children of *two* persons, but an express direction to divide or distribute share and share alike *among* the lawful issue of *three* persons or the *survivors of such issue*, thus clearly making one class of all of the testator's grandchildren, without any reference to their parentage, and making this clear by treating the *survivors*, irrespective of whose children such survivors might be, the successors in right of those who should die.

The will plainly created a *joint tenancy* among all the grandchildren, expressly recognizing and providing for the *jus accrescendi* without discrimination as to the family in which death should occur or survivorship arise.

Other decisions by the Maryland Court of Appeals still further weaken the force of the foregoing cases.

In the case of Alder *vs.* Beall, 11 G. & J. 123 (1840), the language of the will was (p. 124):

> "The residue of my estate, real and personal, to be equally divided between the children of my sister Ann Latimer and their heirs forever, and the children of my sister Penelope Beall and their heirs forever."

The Orphans' Court held (p. 126) that the residue should be divided into *two* equal portions between the *two* sets of children.

The only question in the case was the correctness of this ruling by the Orphans' Court.

The Court of Appeals, after argument, affirmed the judgment, but without opinion. On application the court granted a rehearing and the case was elaborately argued; but the court, without opinion, affirmed the judgment.

In Plummer *vs.* Shepherd, 94 Md. 466, the testatrix devised as follows:

> "I give and bequeath all my real estate to my brother William and his heirs, to my deceased brother Samuel Shepherd's heirs, and the heirs of my deceased brother Joseph; also to the heirs of my deceased sisters, Eliza Bevan and Mary Plummer, share and share alike."

In construing this will the Court of Appeals of Maryland held that the word "heirs" in the will was to be construed as meaning *children* and not heirs in its technical sense, and that the language of the will created five separate classes of beneficiaries who took *per stirpes* and not *per capita*, the court saying in this connection (p. 469):

> "In arriving at this conclusion we do not overlook such cases as Maddox *vs.* The State, 4 H. & J. 539, where the testator directed the residue of his estate 'to be equally divided between his brother Justinian and his brother George's children,' the court holding that the one class thus created took as tenants in common and that distribution was to be made *per capita* and not *per stirpes*. See, also, to the same effect Brown *vs.* Ramsey, 7 Gill, 347; Thompson *vs.* Young, 25 Md. 461, and Brittain *vs.* Carson et al., 46 Md. 189. But in the case at bar the testatrix has herself clearly created five classes, each class designated as 'the heirs' or children of a deceased brother or sister, thus indicating that the share of her estate which would otherwise have been given to such brother or

sister shall go to his or her children. In other words, we are of opinion that this cause should be governed rather by the case of Alder et al. *vs.* Beall, 11 G. & J. 123, and Levering, &c., *vs.* Levering, 14 Md. 38, where it was held that it is apparent from the will itself that it was the intention of the testatrix that the distribution shall be *per stirpes* and not *per capita.*"

The Old Technical Rule of Construction No Longer of Force.

Whatever may be said as to the former importance of the technical rule of construction originating in Webb *vs.* Blakeler, 2 P. Wm. 383, adopted by the earlier cases in Maryland and applied by the Court of Appeals, it has been greatly shaken, if not rejected, in carefully considered cases in many of the States.

In Henry *vs.* Thomas, 118 Ind. 123, the testatrix bequeathed the residue of her estate—

> " to be divided equally between my brothers and my sisters and the children of deceased brothers and sisters and the brothers and sisters of Perry J. Brinegar deceased and the children of deceased brothers and sisters."

In speaking of this bequest the court said (p. 27):

> "The will in this case, it may be said, divides the legatees into two classes—the testatrix's brothers and sisters and the brothers and sisters of Perry J. Brinegar and the children of her deceased brothers and sisters and the children of the deceased brothers and sisters of Perry J. Brinegar."
>
> (p. 28) "We think the proper construction to be given to this will and the manifest intention of the testatrix was to give to the children of each deceased brother and sister of herself and deceased husband the same share that their parent would have taken if living—the child or children of one deceased

brother or sister to take the same share that one living brother or sister should take. In legal phraseology they take per stirpes and not per capita."

(p. 30): "The words 'to be divided between' apply as well to a division among classes as among individuals (Raymond *vs.* Hillhouse, *supra*).

"The rule as stated in Jarman on Wills is that when a devise or bequest is made 'to my son A and the children of my son B' in which case A takes only a share equal to that of one of the children of B they take *per capita*. It may be said that it is stated by the same author that this 'mode of construction will yield to a very faint glimpse of a different intention in the context.' . . . *This rule has been so far abrogated by the courts of the different states that it no longer has any practical force in the construction of wills*, and the weight of authority is to the effect that the beneficiaries take *per stirpes* unless the language used in the devise or bequest is such as to exclude that intention (Minter's Appeal, 40 Pa. St. 111; Fissel's Appeal, 27 Pa. St. 55; Clark *vs.* Lynch, 46 Barb. 68; Vincent *vs.* Newhouse, 83 N. Y. 505; Bool *vs.* Mix, 17 Wend. 119; Alder *vs.* Beall, 11 G. & J. 123)."

In Vincent *vs.* Newhouse, 83 N. Y. 505, the court said (p. 513):

"It may be conceded that under a devise or bequest to one and the children of another it has been often held that, prima facie, the persons take *per capita* and not *per stirpes*, and to this effect are many cases cited by the appellant. But the rule is technical, is subject to many exceptions, and courts readily depart from it when a different intent is discoverable (2 Jarm. on Wills, 107; Balcom *vs.* Haynes, 96 Mass. [14 Allen, 204]; Lockhart, 3 Jones Eq. [N. C. 205]; Fisher *vs.* Skillman's Exrs., 3 C. E. Green, 229; Clark *vs.* Lynch, 46 Barb. 81; Hoppock *vs.* Tucker, 59 N. Y. 202; Ferrer *vs.* Pyne, 81 N. Y. 281)."

In Balcom *vs.* Haynes, 14 Allen, 204, the court, by Mr. Justice Gray, said (p. 204):

> "It is well established as a general rule of the construction of wills, that by a gift either to the children of several persons, or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, the objects of the gift take *per capita* and not *per stirpes;* and therefore in the latter case each child of the second person takes a share equal to the share of the first person. But this, like some other general rules for the construction of wills, has perhaps been adopted and adhered to by the courts rather from the importance of having some rule for interpreting phrases so frequently used by testators than from any strong and preponderating reason in its favor; and the authorities fully support the statement of Mr. Jarmin that 'this mode of construction will yield to a very faint glimpse of a different intention in the context' (2 Jarmin on Wills (4th Amer. Ed.), 111, 112, and notes)."

In Raymond *vs.* Hilhouse, 45 Conn. 467, the devise was in these words (p. 468):

> "All the residue of my estate, real and personal, I give and devise to the following-named persons to be divided equally among them: my sisters Rachel and Sarah, the grandchildren of my brother William and the grandchildren of my deceased sisters Delia and Mary, meaning by this to include all said grandchildren living at the time of my decease."

There were living at the testator's death two grandchildren of the testator's brother William, three of his sister Delia and fourteen of his sister Mary, and the question submitted to the court was whether these grandchildren took under the will per stirpes or all the legatees took per capita.

The court held that the estate should be distributed among the beneficiaries per stirpes and not per capita, and discussing the English rule on this subject, says (p. 474):

> "But we are confronted by the English rule of construction adopted in Massachusetts, New York, and some other States that 'a gift to children, grandchildren, or heirs is equivalent to naming them and is a gift to them individually.' 2 Jarmin on Wills, 1st Am. Ed. 111. The same author, after citing the above rule, adds: 'But this mode of construction will yield to a very faint glimpse of a different intention in the context.'
>
> "If the above rule is so easily set aside, it would seem equally reasonable that it should also yield to the presumption in favor of the natural heirs or next of kin for a distribution according to the statute in all cases where the language of the will is consistent with such a distribution, and the real intention of the testator is in doubt."

In Lyon *vs.* Acker, 33 Conn. 222, the testator gave the property—

> "To my three daughters and the children of my son Samuel A. Lyon, viz: To Mary F. Baker wife of Abram Baker, Susan E. Voorhis wife of William Voorhis, Josephine Lyon and the children of my son Samuel A. Lyon, the homestead where I now reside, to them and their assigns forever, share and share alike."

It was contended that the children of Samuel took *per capita* with the three daughters. But the court said (p. 224):

> "It is claimed that we can only give effect to the words 'share and share alike' by holding that the petitioners take per capita. Had the testatrix simply designated all the devisees by name it would be difficult to resist this claim, but she names her three daughters, and then adds 'and the children of my son Samuel A. Lyon.' The names and number of

these children do not appear in the will. They are referred to only *as a class;* a fact which seems to indicate that she intended to make all the grandchildren only equal to one of the daughters. At least it seems to us that this view of the case gives effect to the words in question as well as the other. If so they do not require us to adopt the construction contended for by the petitioners."

And the court held that the grandchildren took per stirpes.

In Minter's Appeal, 40 Pa. St. 111, the court says (p. 115):

"Then how shall we interpret the bequests? The testator says share and share alike among the children of my brother Adam and the children of my brother Martin, and to my sister Barbara, and by thus expressing himself he seems to make three classes and three equal shares. In another clause he leaves his thought more doubtful. What then can we do but resort to the usual distribution of the law for an analogy to help us? When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees, as he seems to have done, and as the court below did, and allows the three classes to take as their parents would have done; thus they themselves take by a *quasi* representation and *per stirpes*. If he meant that his nephews should be each equal to his sisters the word each would have made his meaning clear."

It is respectfully submitted that the clear purpose of the testator was to divide the residuum of his estate into two equal portions, one to go to the children of his brother Edwin and the other to go to the children of his brother Charles.

The Third and Fourth Errors Assigned.

These assignments of error relate to the action of the court in allowing counsel fees paid to the counsel of the children of Edwin T. McIntire to be charged against the estate instead of against their individual shares in that estate. The Court of Appeals sustained this allowance on the ground that the administrator c. t. a. occupied the same position as an executor, and that an executor, after probate, had the duty to defend the will and was entitled to his counsel fees incurred in that behalf (Rec. p. 73).

Without considering whether an administrator c. t. a. bears such relation to the will, it is respectfully submitted that the counsel fees were not fees paid for services rendered him in that capacity, but were for services rendered to him and four other persons having no official relation to the will and no interest except as legatees.

The first allowance of counsel fees was made upon the petition of five of the legatees, filed March 5, 1886 (Rec. pp. 14–15), in which petition they recited that they were *legatees* under the will—

> "and if said will is set aside your *petitioners* would then, instead of receiving the bulk of the estate, be entitled to only one-half thereof."

They further recited that—

> "Your petitioners have felt called upon to oppose to the fullest extent of the law any action looking to the cancellation of so solemn an undertaking. *They* have to that end retained as counsel Gen'l S. S. Henkle, who for some months past has been managing *their* interests" (Rec. p. 15).

An order was passed authorizing this payment but charging the same to the distributive shares of the petitioners.

This allowance the Court of Appeals did not charge to the estate because no right was reserved in the order making it

to apply to the court to charge it against the estate as in the subsequent cases (Rec. p. 73).

The second payment was made under order of January 31, 1893, which recites that it is made—

> "On motion of S. S. Henkle, on his own behalf and representing the *legatees* Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire,"

and also provides—

> "That the said sum of five thousand dollars shall be charged against the interests of the said Edwin A. McIntire, Sarah McIntire, Elizabeth McIntire Test, Martha McIntire, and Emma T. McIntire in said estate without prejudice, however, to the right of said named legatees or of the administrator c. t. a. to apply to this court at the termination of the litigation touching the validity of the will of the said David McIntire to have said allowance charged against the estate of the said testator" (Rec. p. 19).

The next payment was authorized on July 12, 1895, upon the petition of the same five legatees, in which they refer—

> "To the former proceedings in this cause, particularly their petition and order thereon filed March 5, 1886, for the payment of counsel fees" (Rec. p. 20).

The said petition also prays that the allowance may be charged against the interest of the petitioners, but without prejudice to their right to apply to the court at the close of the litigation to have it charged against the estate; and an order to that effect was passed (Rec. pp. 21–22).

The next payment was authorized on January 28, 1896, upon a petition of the same five legatees, referring to the former proceedings in the cause and particularly to the petition of July 12, 1895, and asking that the allowance be charged against the interest of the petitioners in the estate, but without prejudice to their right to apply to the court at

the close of the litigation to have the payment charged against the estate (Rec. pp. 22–23) and on the same day an order was passed in accordance with the prayer of said petition (Rec. p. 23).

The next payment was authorized on June 1, 1896, upon a petition filed on that date by the same five legatees, which petition also refers to the former proceedings in the cause, and particularly to the petition and order of March 5, 1886, for the payment of counsel fees. The petitioners pray that the said allowance be charged against the interest and shares of the petitioners in the estate, but reserve the right to apply to the court to have the same charged against the estate, and an order was passed in conformity with the prayer of the petition (Rec. pp. 25, 26).

It is thus seen that all five of these legatees retained counsel to represent their interests and that it was for the services rendered to all of them and not to the administrator c. t. a. for which the fees were charged and allowed, the relation of four of said parties being merely that of legatees.

No subsequent application was ever made to the court to have these counsel fees, or any part of them, charged against the estate. No showing was made as to how much of the fees charged were for services rendered to the administrator c. t. a. or to the other four persons who had retained the counsel and upon whose petitions the allowances were made and against whose shares they were charged under all the orders authorizing the payments.

It is respectfully submitted, therefore, that the court was without authority to allow these counsel fees to be charged against the estate—first, because there was no application made for such charge and no opportunity to any person in interest to be heard with respect thereto; and, secondly, because the petitions for said allowances show on their face that four persons by whom the counsel are alleged to have been retained, in whose behalf the services are alleged to have been rendered and who requested the payment as a

charge against their respective shares, were mere legatees, having no official relation to the will and no duty whatsoever with respect to it.

The action of the Court of Appeals in this respect would, if affirmed, authorize every legatee interested under a will to engage counsel for the protection of his interests thereunder and charge the cost of such employment to the estate, which is precisely what has occurred in this instance.

It is respectfully submitted, therefore, that the Court of Appeals erred in allowing these counsel fees of the several legatees to be charged against the estate instead of against the individual interests of said legatees.

Respectfully submitted.

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